

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS

RECORD OF PROCEEDINGS

IN THE CASE OF: [REDACTED]  
[REDACTED]

BOARD DATE: 12 March 2024

DOCKET NUMBER: AR20230008574

APPLICANT REQUESTS:

- Correction of her record to show she was medically discharged due to a military sexual trauma (MST) via a medical evaluation board (MEB) and a physical evaluation board (PEB).
- A personal appearance before the Board.

APPLICANT'S SUPPORTING DOCUMENT(S) CONSIDERED BY THE BOARD:

- DD Form 149 (Application for Correction of Military Record)
- NGB Form 22 (National Guard Report of Separation and Record of Service), 6 December 2018
- NGB Form 23B (Army National Guard (ARNG) Retirement Points History Statement), 19 December 2018
- Department of Veterans Affairs (VA) Rating Decision, 6 March 2023
- Master Military Pay Account

FACTS:

1. The applicant did not file within the 3-year time frame provided in Title 10, U.S. Code, section 1552(b); however, the Army Board for Correction of Military Records (ABCMR) conducted a substantive review of this case and determined it is in the interest of justice to excuse the applicant's failure to timely file.
2. The applicant states that she suffers from post-traumatic stress disorder (PTSD) and an MST as a result of an incident at drill. After the incident, she requested a change of unit and when denied, she asked to go inactive. She was then called back to complete her Periodic Health Assessment and at the doctor's appointment she asked to be discharged.
  - b. Since then, she has filed for VA disability and was able to prove the MST, which lead to her PTSD and was awarded compensation from the VA. With this information, the applicant is seeking to have her NGB Form 22 corrected to state honorable with

disability. She believes that due to the incident she should have been medically discharged. Her NGB Form 22 does state National Guard Regulation (NGR) 600-200 (Enlisted Personnel Management), 6-351(8) medically unfit for retention per Army Regulation 40-501 (Standards of Medical Fitness).

c. She was a victim of MST that has been proven to have happened on duty, during a drill weekend. She has been awarded VA compensation due to PTSD/MST. She was not referred to a medical board per regulation. She was not available to sign her NGB Form 22 at discharge, she received it in the mail after asking to get out. She believes the unit did not fulfill their duties to properly discharge her after requesting to get out of the service. The unit failed to prepare a separation packet for a medical board.

3. The applicant provides the following documents:

- NGB Form 23B (ARNG Retirement Points History Statement), dated 19 December 2018 shows the applicant had 2 years, 5 months, and 8 days creditable service for retired pay.
- VA Rating Decision dated 6 March 2023 shows the applicant received service connection disability rating for PTSD with an evaluation of 70 percent rating effective 4 March 2022.
- The applicant's Master Military Pay Account shows her drill dates for September through November 2016.

4. The applicant's service record contains the following documents:

a. DD Form 4 (Enlistment/Reenlistment Document Armed Forces of the United States), dated 17 November 2015 shows the applicant enlisted in the ARNG.

b. NGB Form 22, shows the applicant was honorably discharged from the ARNG on 6 December 2018 for being medically unfit for retention, in accordance with NGR 600-200. The applicant did not sign the NGB Form 22. She completed 3 years and 20 of net service this period.

c. The applicant's service record is void of medical documentation, a separation packet, or information showing she suffered from MST or PTSD.

5. On 20 November 2023, the Criminal Investigation Division (CID) responded to a request for a CID/Military Police report pertaining to the applicant. CID stated their search revealed no MST records pertaining to the applicant.

6. Based on the applicant's assertion she suffers from PTSD from MST and the VA documentation showing she has PTSD, the Army Review Boards Agency Medical Section provided a medical review for the Board's consideration.

## 7. MEDICAL REVIEW:

a. The applicant requests correction of her record to show she was medically discharged due to a military sexual trauma (MST) via a medical evaluation board (MEB) and a physical evaluation board (PEB). The specific facts and circumstances of the case can be found in the ABCMR Record of Proceedings (ROP). Pertinent to this advisory are the following: 1) The applicant enlisted into the Army National Guard (ARNG) on 17 November 2015; 2) The applicant was honorable discharged from the ARNG on 6 December 2018 for being medically unfit for retention; 3) The applicant's service record is void of medical documentation, a separation packet, or information showing she suffered from MST or PTSD

b. The military electronic medical record (AHLTA), VA electronic medical record (JLV), ROP, and casefiles were reviewed. The electronic military medical record (AHLTA) was not reviewed as it was not used during the applicant's time in service. A review of AHLTA shows the applicant initial BH encounter, during service, occurred on 26 April 2016 whereby she was seen in the walk-in clinic at command's recommendation. The applicant reported recently receiving a counseling statement for hugging a Marine while at the PX and was pending an Article 15 for additional negative counseling statements. She endorsed depressed mood, low self-esteem, and withdrawal. She reported a history of attempting to cover her down mood by pretending to be outgoing but in the process made poor decisions. The applicant also endorsed sleep problems, anhedonia, decreased energy, poor concentration, and change in demeanor. She also reported a history of suicide attempt by overdose but denied current SI. She reported a desire to remain in the military but expressed being confused, as to what to do. She endorsed a desire for therapy and was scheduled for follow-up: no diagnosis was rendered. The applicant was seen for follow-up on 18 May 2016 and reported no change in mood and that she continued making mistakes. She reiterated her desire to remain in the military, and her desire for treatment. She was diagnosed with Adjustment Disorder Unspecified and scheduled for follow-up. Encounter note dated 1 June 2016 shows the applicant presented for follow-up and indicated that she had been feeling much better since the last session. She reported that her worry about life circumstances had diminished and she was living with more of a sense of peace and confidence. She reported that her tension had decreased, sleep had improved, and irritability has diminished as new anxiety-coping skills have been implemented. She also reported that she had passed her PT test and was able to graduate and leave and return home. ALTHA was void of any additional BH encounters for the applicant.

c. A review of JLV shows the applicant 70 SC for PTSD secondary to MST. Initial PTSD DBQ dated 24 August 2022 shows the applicant reported that she was sexually assaulted by her supervisor and another female Soldier. The applicant reported intrusive thoughts, avoidance of distressing memories, difficulty experiencing positive

emotions, hyper-arousal, concentration problems, sleep problems, and irritability. The examiner determined the applicant endorsed sufficient symptoms to meet criteria for PTSD secondary to MST. Records show the applicant's initial BH treatment encounter with the VA occurred on 20 June 2023 whereby the applicant presented with complaints of depression and anxiety. Depressive symptoms included depressed mood, decreased appetite, crying episodes, feelings of worthlessness, low motivation and sleep problems. Anxiety symptoms included shortness of breath, nervousness, rapid heart rate, and sweating. The applicant also reported a history of PTSD with continued having difficulty with nightmares, increased startle response, hypervigilance, and difficulty with trust. She denied SI/HI. The applicant was diagnosed with PTSD, Depression, and Anxiety, prescribed psychotropic medication and scheduled for outpatient treatment.

d. The applicant requests correction of her record to show she was medically discharged due to a military sexual trauma (MST) via a medical evaluation board (MEB) and a physical evaluation board (PEB). A review of the records shows the applicant is 70 percent SC for PTSD secondary to MST that she reports occurred during drill, at her NG Unit. NGB Form 22 shows the applicant was separated from service due to unfitness IAW with AR 40-401 and Orders Number 346-514 list her separation being due to Medical, Physical, or Mental Health Condition. Per AR 635 -40 and AR 50-501, the applicant should have been referred for a MEB before separation, given the reason for separation. In absence of documentation demonstrating the applicant's case was referred to MEB before separation, it is the recommendation of this advisor that the applicant's case be referred to IDES for further review and disposition. After reviewing the available evidence, it is the opinion of this medical advisor that the applicant had a condition or experience during her time in service that mitigates the administrative action.

#### Kurta Questions:

(1) Does any evidence state that the applicant had a condition or experience that may excuse or mitigate a discharge? Yes. The applicant is 70 percent SC for PTSD.

(2) Did the condition exist or experience occur during military service? Yes.

(3) Does the condition or experience actually excuse or mitigate the discharge? Yes. A review of the records shows the applicant is 70 percent SC for PTSD secondary to MST that she reports occurred during drill, at her NG Unit. NGB Form 22 shows the applicant was separated from service due to unfitness IAW with AR 40-401 and Orders Number 346-514 list her separation being due to Medical, Physical, or Mental Health Condition. Per AR 635 -40 and AR 50-501, the applicant should have been referred for a MEB before separation, given the reason for separation. In absence of documentation demonstrating the applicant's case was referred to MEB before separation, it is the recommendation of this advisor that the applicant's case be referred to IDES for further review and disposition.

**BOARD DISCUSSION:**

1. The Board determined the evidence of record was sufficient to render a fair and equitable decision. As a result, a personal appearance hearing is not necessary to serve the interest of equity and justice in this case.
  
2. After reviewing the application, all supporting documents, and the evidence found within the military record, the Board found that relief was warranted. The applicant's contentions, the military record, and regulatory guidance were carefully considered. The complete facts and circumstances surrounding her discharge from the ARNG are not available for review. Her NGB Form 22 shows she was honorably discharged from the ARNG on 6 December 2018 for being medically unfit for retention, in accordance with NGR 600-200. She completed 3 years and 20 of net service this period. The specific medical condition or conditions that rendered her unfit for retention in the ARNG is/are unknown from the available service records. Likewise, the onset of this condition(s) is also unknown. The Board reviewed and agreed with the medical reviewer's finding that the applicant should have been referred for a MEB before separation, given the reason for separation. In absence of documentation demonstrating the applicant's case was referred to MEB before separation, the Board recommends the applicant's case be referred to IDES for further review and disposition.

**BOARD VOTE:**

<u>Mbr 1</u>	<u>Mbr 2</u>	<u>Mbr 3</u>	
:	:	:	GRANT FULL RELIEF
■	■	■	GRANT PARTIAL RELIEF
:	:	:	GRANT FORMAL HEARING
:	:	:	DENY APPLICATION

**BOARD DETERMINATION/RECOMMENDATION:**

1. The Board determined that the evidence presented was sufficient to warrant a recommendation for partial relief. As a result, the Board recommends that all Department of the Army records of the individual concerned be corrected by directing the applicant be entered into the Integrated Disability Evaluation System (DES) and a Medical Evaluation Board (MEB) convened to determine whether the applicant's

condition(s), to include applicable conditions, met medical retention standards at the time of service separation.

a. In the event that a formal physical evaluation board (PEB) becomes necessary, the individual concerned will be issued invitational travel orders to prepare for and participate in consideration of their case by a formal PEB. All required reviews and approvals will be made subsequent to completion of the formal PEB.

b. Should a determination be made that the applicant should have been separated or retired under the DES, these proceedings will serve as the authority to void their administrative separation and to issue them the appropriate separation retroactive to their original separation date, with entitlement to all back pay and allowances and/or retired pay, less any entitlements already received

2. The Board further determined that the evidence presented is insufficient to warrant a portion of the requested relief. As a result, the Board recommends denial of so much of the application that pertains to changing type of discharge without evaluation under IDES.



I certify that herein is recorded the true and complete record of the proceedings of the Army Board for Correction of Military Records in this case.

REFERENCES:

1. Title 10, U.S. Code, section 1552(b), provides that applications for correction of military records must be filed within 3 years after discovery of the alleged error or injustice. This provision of law also allows the ABCMR to excuse an applicant's failure to timely file within the 3-year statute of limitations if the ABCMR determines it would be in the interest of justice to do so.

2. Title 10, USC, chapter 61, provides the Secretaries of the Military Departments with authority to retire or discharge a member if they find the member unfit to perform military duties because of physical disability. The U.S. Army Physical Disability Agency is responsible for administering the Army physical disability evaluation system and executes Secretary of the Army decision-making authority as directed by Congress in chapter 61 and in accordance with Department of Defense Directive 1332.18 and Army Regulation 635-40 (Physical Evaluation for Retention, Retirement, or Separation).

3. Army Regulation (AR) 635-40 (Disability Evaluation for Retention, Retirement, or Separation) establishes the Army Disability Evaluation System and sets forth policies, responsibilities, and procedures that apply in determining whether a Soldier is unfit because of physical disability to reasonably perform the duties of his office, grade, rank, or rating. Only the unfitting conditions or defects and those which contribute to unfitness will be considered in arriving at the rated degree of incapacity warranting retirement or separation for disability.

a. Soldiers are referred to the disability system when they no longer meet medical retention standards in accordance with AR 40-501, chapter 3, as evidenced in an MEB; when they receive a permanent physical profile rating of "3" or "4" in any functional capacity factor and are referred by a Military Occupational Specialty Medical Retention Board; and/or they are command referred for a fitness for duty medical examination.

b. The disability evaluation assessment process involves two distinct stages: the MEB and physical evaluation board (PEB). The purpose of the MEB is to determine whether the service member's injury or illness is severe enough to compromise his or her ability to return to full duty based on the job specialty designation of the branch of service. A PEB is an administrative body possessing the authority to determine whether a service member is fit for duty. A designation of "unfit for duty" is required before an individual can be separated from the military because of an injury or medical condition. Service members who are determined to be unfit for duty due to disability are either separated from the military or are permanently retired, depending on the severity of the disability and length of military service. Individuals who are "separated" receive a onetime severance payment, while veterans who retire based upon disability receive monthly military retired pay and have access to all other benefits afforded to military retirees.

c. The mere presence of medical impairment does not in and of itself justify a finding of unfitness. In each case, it is necessary to compare the nature and degree of physical disability present with the requirements of the duties the Soldier may reasonably be expected to perform because of his or her office, grade, rank, or rating. Reasonable performance of the preponderance of duties will invariably result in a finding of fitness for continued duty. A Soldier is physically unfit when medical impairment prevents reasonable performance of the duties required of the Soldier's office, grade, rank, or rating.

4. Title 10, USC, section 1201, provides for the physical disability retirement of a member who has at least 20 years of service or a disability rating of at least 30 percent. Title 10, USC, section 1203, provides for the physical disability separation of a member who has less than 20 years of service and a disability rating of less than 30 percent.

6. Title 38, USC, sections 1110 and 1131, permits the VA to award compensation for disabilities that were incurred in or aggravated by active military service. However, an award of a higher VA rating does not establish error or injustice on the part of the Army. The Army rates only conditions determined to be physically unfitting at the time of discharge which disqualify the Soldier from further military service. The VA does not have the authority or responsibility for determining physical fitness for military service. The VA awards disability ratings to veterans for service-connected conditions, including those conditions detected after discharge, to compensate the individual for loss of civilian employability. These two government agencies operate under different policies. Unlike the Army, the VA can evaluate a veteran throughout his or her lifetime, adjusting the percentage of disability based upon that agency's examinations and findings.

7. AR 135-180 (Retirement for Non-Regular Service) implements statutory authorities governing the granting of retired pay for non-regular service to Soldiers in the Army National Guard (ARNG), Army National Guard of the United States (ARNGUS) or the U.S. Army Reserve (USAR).

a. Paragraph 2-2 (Basic qualifying service requirements) states, to be eligible for retired pay at or after the age (60 years of age) specified in paragraph 2-1, an individual need not have military status at the time of application, but must have completed one of the following: (1) A minimum of 20 years of qualifying service computed under Title 10, USC, section 12732; or, (2) Fifteen (15) years of qualifying service, and less than 20, computed under Title 10, USC, section 12732, if the individual is to be separated because the Soldier has been determined unfit for continued Selected Reserve service, and none of the conditions in 10 USC 12731b(b) exist.

b. Paragraph 2-3 (Other service requirements) states in pertinent part, additional Reserve Component (RC) service requirements include —



(1) For Soldiers who completed the years of qualifying service on or after 5 October 1994, but before 25 April 2005, the last 6 years of qualifying service must have been in a component other than a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve.

(2) For Soldiers who completed the years of qualifying service on or after 25 April 2005, there is no minimum RC service requirement.

(3) The service required in paragraphs 2–3a(1) and 2–3a(2) do not need to be continuous years of qualifying service.

(4) Any period of service as a member of a regular component between periods of Reserve service counted toward the 8 or 6 years requirement will be included in the determination of the Soldier's years of qualifying service in paragraph 2–2 toward eligibility for non-regular retired pay, but will not count toward the last 8 or 6 years. Any Reserve service served in conjunction with regular service will not count toward the last 8 or 6 years (that is, partial year credit). An applicant must (1) not be entitled to retired pay from the Armed Forces under any other provision of law; (2) not have elected to receive disability severance pay in lieu of non-regular retired pay. Reserve personnel involuntarily relieved from active service who are not eligible for retired pay at time of release, but who are paid readjustment pay are eligible to receive retired pay under this regulation provided they are otherwise qualified at a later date; (3) not be a person who is convicted of an offense under the Uniform Code of Military Justice (Title 10, USC, Chapter 47) and whose sentence includes death; or is separated pursuant to sentence of a court-martial with a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal, because Title 10, USC, section 12740 provides that such persons are not eligible for non-regular retired pay.

c. Paragraph 2-4 (Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter)) states, (1) Under Title 10, USC, section 12731a RC Soldiers who complete the eligibility requirements in section I will be notified in writing within 1 year after completion of the required service in accordance with AR 140–185 or National Guard Regulation (NGR) 680–2. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued to Soldiers credited with 20 years of qualifying service and should be issued prior to discharge or transfer to the Retired Reserve. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued by: (a) HRC for all USAR Soldiers except for those who are within 2 years of qualifying for an active duty retirement and can remain on active duty to complete the required service. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued in the format determined by HRC. (b) The State Adjutant General (Military Personnel Management Office (MPMO/G1) for all Army National Guard (ARNG) Soldiers serving in an active status in the State, where the eligible Soldier was assigned at the time they

become eligible. The Notification of Eligibility for Retired Pay at Age 60 (20 Year Letter) will be issued in the format shown in NGR 680–2. (2) After a Soldier has been notified of their eligibility for retired pay for non-regular service, the Soldier's eligibility for retired pay may not be denied or revoked on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed, unless it resulted directly from the fraud or misrepresentation of the individual concerned. However, the number of years of creditable service upon which retired pay is computed may be adjusted to correct any error, miscalculation, misinformation, or administrative determination, and when such a correction is made the person is entitled to retired pay in accordance with the number of years of creditable service, as corrected, from the date they are granted retired pay.

8. On 3 September 2014, the Secretary of Defense directed the Service Discharge Review Boards (DRBs) and Service Boards for Correction of Military/Naval Records (BCM/NRs) to carefully consider the revised PTSD criteria, detailed medical considerations and mitigating factors when taking action on applications from former service members administratively discharged under other than honorable conditions and who have been diagnosed with PTSD by a competent mental health professional representing a civilian healthcare provider in order to determine if it would be appropriate to upgrade the characterization of the applicant's service.

9. On 25 August 2017 the Office of the Undersecretary of Defense for Personnel and Readiness issued clarifying guidance for the Secretary of Defense Directive to DRBs and BCM/NRs when considering requests by Veterans for modification of their discharges due in whole or in part to: mental health conditions, including PTSD; traumatic brain injury (TBI); sexual assault; or sexual harassment. Standards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the sexual assault or sexual harassment was unreported, or the mental health condition was not diagnosed until years later. Boards are to give liberal consideration to Veterans petitioning for discharge relief when the application for relief is based in whole or in part on those conditions or experiences. The guidance further describes evidence sources and criteria and requires Boards to consider the conditions or experiences presented in evidence as potential mitigation for misconduct that led to the discharge.

10. On 25 July 2018, the Under Secretary of Defense for Personnel and Readiness issued guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records (BCM/NRs) regarding equity, injustice, or clemency determinations. Clemency generally refers to relief specifically granted from a criminal sentence. BCM/NRs may grant clemency regardless of the type of court-martial. However, the guidance applies to more than clemency from a sentencing in a court-martial; it also applies to other corrections, including changes in a discharge, which may be warranted based on equity or relief from injustice.

a. This guidance does not mandate relief, but rather provides standards and principles to guide Boards in application of their equitable relief authority. In determining whether to grant relief on the basis of equity, injustice, or clemency grounds, BCM/NRs shall consider the prospect for rehabilitation, external evidence, sworn testimony, policy changes, relative severity of misconduct, mental and behavioral health conditions, official governmental acknowledgement that a relevant error or injustice was committed, and uniformity of punishment.

b. Changes to the narrative reason for discharge and/or an upgraded character of service granted solely on equity, injustice, or clemency grounds normally should not result in separation pay, retroactive promotions, and payment of past medical expenses or similar benefits that might have been received if the original discharge had been for the revised reason or had the upgraded service characterization.

11. Army Regulation 15-185 (ABCMR) prescribes the policies and procedures for correction of military records by the Secretary of the Army, acting through the ABCMR. The ABCMR may, in its discretion, hold a hearing or request additional evidence or opinions. Additionally, it states in paragraph 2-11 that applicants do not have a right to a hearing before the ABCMR. The Director or the ABCMR may grant a formal hearing whenever justice requires.

12. Title 10, U.S. Code, section 1556 requires the Secretary of the Army to ensure that an applicant seeking corrective action by the Army Review Boards Agency (ARBA) be provided with a copy of any correspondence and communications (including summaries of verbal communications) to or from the Agency with anyone outside the Agency that directly pertains to or has material effect on the applicant's case, except as authorized by statute. ARBA medical advisory opinions and reviews are authored by ARBA civilian and military medical and behavioral health professionals and are therefore internal agency work product. Accordingly, ARBA does not routinely provide copies of ARBA Medical Office recommendations, opinions (including advisory opinions), and reviews to Army Board for Correction of Military Records applicants (and/or their counsel) prior to adjudication.

//NOTHING FOLLOWS//